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Supreme Court of the United States

OCTOBER TERM, 1962

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, NEW ORLEANS TELEVISION CORPORATION, CAPITOL BROADCASTING COMPANY AND AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing petitioner's notice of intention to intervene in an appeal from an order of the Federal Communications Commission entered in a proceeding in which petitioner took an active part.

OPINIONS BELOW

The Court of Appeals wrote no opinion. The memorandum opinion and order of the Federal Communications Commission (FCC R. 298-306)[1] is reported at 23 Pike & Fischer Radio Reg. 1113 and is printed at pages 1a-14a, *infra*.

JURISDICTION

The judgment of the Court of Appeals dismissing petitioner's notice of intention to intervene (R. 66; p. 15a, *infra*) was entered on November 16, 1962. Its orders denying a timely-filed petition for reconsideration and reconsideration *en banc* (R. 93-94; pp. 16a-17a, *infra*) were entered on January 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

QUESTION PRESENTED

Whether under Section 402(e) of the Communications Act a person has the right to intervene and participate in proceedings upon an appeal from an order of the Federal Communications Commission when such person (1) in recognition of its interest was allowed by the Commission, over objection, actively to participate in the proceeding that eventuated in the Commission's order, and the points made by it, including those made by it alone, were discussed and dealt with by the Commission, (2) was notified by the Commission, pursuant to Section 402(d) of the Communications Act, requiring that notice be given to each person shown by the Commission's records to be inter-

[1] References "(FCC R. ....)" are to the record made before the Federal Communications Commission filed in this Court. References "(R. ....)" are to the record of proceedings in the court below filed in this Court.

ested in an appeal, of the filing and pendency of the appeal from the Commission's order and (3) thereafter duly and timely filed a notice of intention to intervene and a verified statement showing the nature of its interest pursuant to Section 402(c), which provides that "any interested person" may intervene and participate in the proceeding upon an appeal from a Commission order by making such a filing.

STATUTES INVOLVED

Section 402 of the Communications Act of 1934, 48 Stat. 1093, as amended, 66 Stat. 718, 47 U.S.C. § 402, provides in pertinent part:

> "(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission, under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950 [5 U.S.C. ch. 19A].
>
> "(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> "(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> "(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
>
> "(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

"(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

"(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

"(6) By any person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

"(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

"(8) By any radio operator whose license has been suspended by the Commission.

"(c) Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. . . .

"(d) Upon the filing of any such notice of appeal the Commission shall, not later than five days after the date of service upon it, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same and shall thereafter permit any such person to inspect and make copies of said notice and statement of reasons therefor at the office of the Commission in the City of Washington. . . .

"(e) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and

statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party."

STATEMENT

Petitioner is an association with a membership of approximately 150 television stations located throughout the United States. Petitioner and its members are vitally interested in maintenance of television service of high technical quality to the public. Such service is assured by Federal Communications Commission rules that set minimum mileage separations between television stations operating on the same or adjacent channels to avoid or minimize electrical interference as between stations. Petitioner has consistently participated in proceedings before the Commission in support of these mileage separation rules, without regard to whether any affected station is one of its members, as a matter of principle and in the interest of the public and television broadcasters generally in order to assure the maintenance of a high technical quality of television service.

One such proceeding was a rule making proceeding assigned the Commission's docket number 13340. The problem to which the Commission addressed itself in that case was that of making available additional very high frequency (VHF) television channels (channels 2 through 13) in a number of major cities in the interim before full utilization of ultra high frequency (UHF) channels (channels 14 through 83) could be made. The conclusion of the Commission was to consider further whether to permit, under purported safeguards, the assignment of channels, in a limited number of specified cities, that would be closer than the Commission's

rules allowed to stations in other cities on the same or adjacent channels. (See FCC R. 299). Petitioner was a vigorous participant in Docket No. 13340.

One of the cities the Commission in Docket No. 13340 designated for further consideration was New Orleans, Louisiana. (See FCC R. 300). A construction permit had been issued, consistent with all Commission rules, for Channel 12 to serve that city, but the authorized transmitting facilities had not been built. The Commission said it would entertain an application for a modification of the Channel 12, New Orleans, construction permit to allow the transmitting facilities to be built closer to WJTV, Channel 12, in Jackson, Mississippi, than the standing rule of the Commission, 47 C.F.R. § 3.610, permitted. It provided that "interested parties may respond to the application." (*Ibid.*)[2]

The respondent New Orleans Television Corporation (New Orleans), therefore, applied for modification of the construction permit it held for Channel 12. (FCC R. 2, 17). The application as filed would permit New Orleans to locate its transmitter at a site about thirty miles closer to WJTV, the existing Channel 12 station of respondent Capitol Broadcasting Company (Cap-

[2] The procedure ordered to be followed in giving further consideration to the proposal for authorizing use of Channel 12 at New Orleans at mileage separations less than those specified in the Commission's rules differed from the procedure ordered to be followed in most of the other cases designated for further consideration. In such other cases the proposed channels were not then even assigned by § 3.606 of the Commission's rules to the designated cities and hence no applications for those channels could be filed. In such other cases the Commission ordered procedure by way of rule making to consider whether a short-spaced channel should be made available in any of the designated cities and, if so, to amend § 3.606 of the rules to make such a channel available for subsequent applications. Since Channel 12 already was available in New Orleans under § 3.606 of the rules, no rule making procedure was required to precede the consideration of applications.

itol), a member of petitioner, in Jackson, Mississippi, and about five miles closer to the authorized transmitter site for an adjacent-channel station in Houma, Louisiana, than the minimum distances permitted by the Commission's rules.

Capitol filed with the Commission a petition to deny the application (FCC R. 68-94), and the permittee of the Houma station filed a petition to designate the application for hearing or for other relief (FCC R. 62-67). Petitioner presented detailed engineering, policy and legal objections to the grant of the application urging, *inter alia*, that granting the application would be contrary to the public interest in retaining interference-free television service, made possible by the Commission's mileage separation requirements; that the New Orleans application should be considered simultaneously with the eight rule making proceedings involving the other "short-spacing" proposals arising from Docket No. 13340 so that the cumulative effect of all could be weighed; that a grant of the application would modify the licenses of Capitol and the Houma permittee, thus entitling them to a prior evidentiary hearing, and that, wholly apart from the impact on Capitol and the Houma permittee, the public interest in a nationwide system of television allocations required strict adherence to the standards intended to maintain the technical integrity of the system to avoid a haphazard, step-by-step erosion of technical performance. (FCC R. 110-15).[3]

[3] The objections themselves were in brief, summary form, but petitioner relied upon and incorporated by reference its comprehensive comments in the eight rule making proceedings in which the Commission was then considering other "short-spacing" proposals arising from Docket No. 13340 that presented issues virtually identical to those posed by New Orleans' application. The comments consisted of 40 pages of text supported by a detailed engineering affidavit, tables, maps and charts.

Further pleadings were filed by New Orleans and the protesting parties. (See FCC R. 298). New Orleans filed among other things a motion to strike the objections of petitioner on the ground that petitioner did not have a sufficient interest to entitle it to be heard. (FCC R. 117-26).

By order of July 25, 1962, the Commission granted New Orleans' application without hearing. (FCC R. 298-306; pp. 1a-14a, *infra*). By that same order the Commission denied New Orleans' motion to strike petitioner's objections. (FCC R. 299; pp. 2a-3a, *infra*). In doing so, it relied upon (a) Section 1.361(a) of its Rules, 47 C.F.R. § 1.361(a), which provides that "any person may file informal objections to the grant" of an application such as New Orleans had filed, (b) the fact that petitioner was one of the "interested parties" to the application, to which the Commission, in its order in Docket No. 13340, had reserved the right to respond to the New Orleans application, and (c) the "intimate inter-relationship between the present proceeding" and Docket No. 13340 in which, as we have said, petitioner had actively participated.

The Commission, having thus allowed petitioner's participation, proceeded to deal at some length with its contentions and purportedly to dispose of them. (FCC R. 301-02; pp. 5a-8a, *infra*).

Thereafter Capitol, pursuant to Section 402(b)(6) of the Communications Act, 47 U.S.C. § 402(b)(6), permitting an appeal by a person "aggrieved or whose interest is adversely affected" by a Commission order granting any of certain designated types of applications, filed an appeal from the order granting New Orleans' application in the Court of Appeals for the District of Columbia Circuit. (R. 1-9).

Upon the filing of the appeal the Commission notified petitioner of such filing and of the pendency of the appeal. The letter of notification specifically stated that it was mailed to petitioner's counsel "pursuant to the provisions of Section 402(d) of the Communications Act of 1934, as amended." (FCC R. 315). That statute, 47 U.S.C. § 402(d), provides that within five days of service upon it of a notice of appeal the Commission shall "notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same." Within the time allowed petitioner, pursuant to Section 402(e) of the Communications Act, 47 U.S.C. § 402(e), filed in the Court of Appeals a notice of intention to intervene and a verified statement showing the nature of its interest. (R. 15-22). Section 402(e) provides that "any interested person may intervene and participate in the proceedings" upon an appeal under Section 402(b) by filing such a notice and such a statement.

The Commission and New Orleans moved separately to dismiss petitioner's notice of intention to intervene. The Commission in its motion took the position that because of the second sentence of Section 402(e), which specifies as one category of persons that shall be considered "interested" those "who would be aggrieved or whose interest[s] would be adversely affected by a reversal or modification of the order of the Commission complained of," only those who wish to support the Commission's order have a right to intervene under the section. (R. 33-36). The Commission did not dispute that petitioner otherwise was an "interested person." New Orleans urged additionally that petitioner's interest was not sufficient and that, if intervention in support of the appellant was ever proper, the prospective intervenor must show that it was a person

aggrieved or whose interest was adversely affected so as to give it a right to appeal. (R. 44-49).

On November 16, 1962, the Court of Appeals, without stating the grounds for its decision, granted the motions to dismiss. (R. 66; p. 15a, *infra*). On January 10, 1963, again without stating its grounds, it denied petitioner's petition for reconsideration and reconsideration *en banc*. (R. 93-94; pp. 16a-17a, *infra*).

The appeal meanwhile is going forward through briefing to argument and decision. Both New Orleans and respondent American Broadcasting-Paramount Theatres, Inc., owner of the television network (ABC) with which New Orleans' Channel 12 station will be affiliated and which did not participate in the proceeding before the Commission, have intervened and are participating in the appeal. Pursuant to the rules of the Court of Appeals petitioner asked consent of the parties to its filing a brief *amicus curiae*. All of the parties except New Orleans gave their consent. Petitioner then filed a motion for leave to file a brief and to participate in oral argument as *amicus curiae*. Over the opposition of New Orleans this motion was on February 18, 1963, granted as to the filing of a brief but denied as to oral argument. Petitioner's rights have been finally and adversely determined by dismissal of its notice of intention to intervene. *Cf. FCC* v. *NBC(KOA)*, 319 U.S. 239, 246. Grant of leave to file a brief *amicus curiae* does not alter this fact. The filing of such a brief is only at the discretion of the Court below rather than as of right. Moreover, petitioner will not have the right to file a reply brief (D.C. Cir. Rule 18[j][3]; compare R. 63-64) or to participate in oral argument or to seek or participate in any further review in this Court of the Court of Appeals' decision on the merits.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the District of Columbia Circuit affects the rights of would-be intervenors in every case in which review is sought of an order of the Federal Communications Commission granting or denying a license to construct or operate a television or radio station. In construing Section 402(e) of the Communications Act, 47 U.S.C. § 402(e), to prohibit intervention by petitioner in this case the court below has decided an important question of federal law that has not been and should be decided by this Court.[4]

By Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), Congress has conferred exclusively on the Court of Appeals for the District of Columbia Circuit jurisdiction over appeals from certain categories of orders of the Federal Communications Commission, including all its orders relating to the grant, denial, renewal and modification of licenses to construct or operate television and radio stations. Thus, the decisions of that court on procedural points in appeals from FCC licensing orders are binding on all litigants unless reviewed by this Court.

Under the statute an appeal may be taken by one whose application is denied or, more generally, "by any person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any [such] application." The "person aggrieved . . ." phrase is language of art under which standing to prosecute an appeal depends upon the prospect of electrical interference or financial injury from the Commission's action. *FCC* v. *NBC (KOA)*, 319 U.S. 239, 246-47; *FCC* v. *Sanders Bros. Radio*

[4] The decision is final as to petitioner. Cf. Sam Fox Publishing Co. v. United States, 366 U.S. 683, 687-88.

Station, 309 U.S. 470, 476-77. In its principal effect it places the person who will be so injured by the grant of an application in the same position as the person whose application for a license is denied, enabling him "to appeal and to raise . . . any relevant question of law in respect of the order of the Commission." 309 U.S. at 477.

Without regard to whether petitioner could have appealed from the Commission's order, *cf. National Motor Freight Traffic Ass'n v. United States*, No. 479, opinion on denial of rehearing, February 25, 1963, the provisions of the Communications Act permitting intervention in appeal proceedings are much broader than those dealing with the taking of an appeal. In the first instance, the Commission must notify anyone shown by its records "to be interested" in an appeal of the filing and pendency of such an appeal. 47 U.S.C. §402(d). The Commission recognized in this case that petitioner was such a person by formally notifying it, pursuant to Section 402(d), of the filing of Capitol's appeal.

Thereafter, within thirty days after the filing of the appeal, Section 402(e) permits "any interested person" to intervene simply by filing a notice of intervention and a verified statement showing the nature of its interest. Petitioner complied with this provision of the statute.

Nevertheless, and for reasons it did not state, the court below granted motions to dismiss petitioner's notice of intervention. It must have done so on one of two grounds, each of which is quite untenable and either of which would have serious consequences for persons interested in a Commission order who have good reason to participate in a judicial test of its validity.

The first possible ground is that suggested by the Commission itself in its motion to dismiss petitioner's notice of intervention. This ground is that only those who seek to support the questioned order of the Commission may intervene in an appeal. To reach this result, the Commission urged the court below that the second sentence of Section 402(e), providing that "any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party," sets forth an all-inclusive definition of the term "any interested person" used in the first sentence of the statute. On this view the Congress, having in one sentence broadly described those entitled to intervene in an appeal from a Commission order by use of the phrase "any interested person," in the next sentence destroyed its own handiwork by defining that term so narrowly as to preclude intervention by any except those with the most vital and obvious interest in sustaining the Commission's order. This is contrary to the most elementary principle of statutory construction, which requires that effect be given to all parts of a statute. *E.g., United States* v. *Menasche*, 348 U.S. 528, 538-39. If the Congress had had the intention the Commission imputes to it, the logical and simple thing for it to do would have been to state in a single sentence that any person who would be aggrieved or whose interest would be adversely affected by reversal or modification of the Commission's order might intervene. That is not what the Congress did.

Indeed, it appears that the Congress quite deliberately chose not to take this course. The predecessor to Section 402(e) was first enacted in 1930, 46 Stat. 845, as part of a badly-needed comprehensive revision of the judicial review provision of the Radio Act of

1927, § 16, 44 Stat. 1169. The Committee on Radio Law of the American Bar Association had reported in 1929 that "in no respect is the Radio Act of 1927 more unsatisfactory than in the appellate procedure provided." 54 A.B.A. Rep. 461 (1929). For one thing, only a person whose license application had been denied or whose license had been revoked could appeal; there was no prevision for appeal by a person harmed by the grant of a license. For another thing, there was no specific provision for intervention; not even the right to be before the court of a person who would be directly and immediately harmed by the reversal or modification of the agency's order was clear. See *id.* at 461, 469; 55 A.B.A. Rep. 364 (1930).[5] The 1930 amendment granted the right of appeal to "any . . . person, firm, or corporation aggrieved or whose interests are adversely affected by" a Commission decision. As for intervention, it did not simply adopt a correlative provision that only a person who would be "aggrieved . . ." by reversal of a Commission decision could intervene. Rather, it provided, in substantially the broad terms of Sections 402(d) and (e) as they read today, for notice of ap-

[5] Persons claiming that they would be aggrieved by reversal of a Commission decision were arguing in the court of appeals at the time the 1930 amendment was adopted by the Congress that § 16 of the Radio Act could not constitutionally be construed to permit rendition of a judgment affecting their rights in a proceeding to which they were not parties. 55 A.B.A. Rep. 393 n. 3 (1930); see Intercity Radio Tel. Co. v. Federal Radio Comm'n, 46 F.2d 602 (D.C. Cir. 1931).

The deficiencies in § 16 mentioned in the text were in addition to the fact that the Court of Appeals was empowered by § 16 to "alter or revise the decision appealed from and enter such judgment as to it may seem just," which this Court in Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464, construed as making the court's review administrative rather than judicial so that further review in this Court could not constitutionally be had. The 1930 amendment remedied this. See Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266.

peals to interested persons and for intervention by such persons.[6] The Congress went on to specify and thus leave no doubt that those who would be aggrieved or whose interests would be adversely affected by reversal—with whose plight the ABA committee was naturally most concerned—should be considered "interested." Congress did not manifest any intention, however, that they alone could intervene. Search of the contemporaneous legislative materials has revealed nothing from which such an intent could be inferred.

Not only is the Commission's construction of Section 402(e) erroneous, but also, if the decision below was based upon that construction, it would severely dislocate rights of intervention in appellate proceedings relating to Commission orders. It would mean that even a person with an interest substantial enough to enable him to appeal himself from a Commission order would not be able to intervene in an appeal. One result of this would be that if, for example, more than one appeal was taken from the same Commission order or appeals were taken by different parties from related Commission orders, the appealing parties could not

[6] The amendment provided that "any interested person, firm, or corporation" might intervene in an appeal "by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party." The second sentence of the section provided that "any person, firm, or corporation who would be aggrieved or whose interests would be adversely affected by a reversal or modification of" the Commission's order "shall be considered an interested party." 46 Stat. 845. The word "party" apparently was used to avoid repetition of the phrase "person, firm, or corporation." When the Communications Act of 1934 was adopted, containing a definition of person to include corporations and other entities, § 3(i), 48 Stat. 1066, the openings of the two sentences were simplified to read simply "person," but the word "party" continued to be used elsewhere. In light of this history, the use of the word "party" in § 402(e) is not relevant to the issue raised by this petition.

intervene in any companion appeal. The court below has permitted intervention in those circumstances. See, *e.g.*, *Bendix Aviation Corp.* v. *FCC*, 272 F.2d 533 (D.C. Cir. 1959). A further result would be that a person with an appealable interest must himself appeal within the thirty days allowed or be forever precluded from participation in any appeal proceedings arising from an order of the Commission.

The second possible ground of the decision of the court below is that suggested by the respondent New Orleans. This is that Section 402(e) permits intervention only by persons who would be aggrieved or whose interests would be adversely affected either by affirmance or by reversal of the Commission's order. This view, which differs from that of the Commission in that it would permit a narrowly defined group of persons to intervene on the side of an appellant, is altogether indefensible. It equates the right to intervene on the side of the appellant with the right to appeal and thus ignores the fact that Congress deliberately used the phrase "any interested person" in Section 402(e), thus broadly describing the category of persons with intervention rights, as opposed to the narrow and restrictive "person aggrieved . . ." phrase used in Section 402(b)(6) to describe those who can appeal from a Commission order. There is no basis whatever for obscuring, as New Orleans urged the court below to do, this marked difference in statutory language.

To adopt New Orleans' view of the statute would have substantially the same disruptive effects upon intervention rights in FCC appeal proceedings as the Commission's view. While intervention on the side of the Commission by one with technical standing to appeal would be permitted—thus avoiding one of the

extreme consequences of the Commission's construction of the statute—all others, whatever their status in the Commission proceedings, whatever the extent of their contribution to the record on which the Commission order was based and however vital their interest in that order, would be foreclosed.

2. The term "any interested person"—the language of Section 402(e) of the Communications Act—or an equivalent is used three times in the Administrative Procedure Act to describe persons entitled to take part in agency rule making or adjudicatory proceedings in contexts that admit of no doubt that something other than a technical "party in interest" or "person aggrieved" is meant.

This Court has recognized that the language of Section 402(e) is parallel to that language of the Administrative Procedure Act. In *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 193, the Court declared in connection with a petition to review a Commission order in a rule making proceeding:

> "As required by 5 U.S.C. § 1003(b) [Section 4(b) of the Administrative Procedure Act], the notice [of proposed rule making] permitted 'interested' parties to file statements or briefs. Such parties might also intervene in appeals. 47 U.S.C. § 402(d) and (e)."

Section 4(b) of the Administrative Procedure Act, to which the Court referred, provides that "the agency shall afford *interested persons* an opportunity to participate in the rule making . . ." Similarly, Section 6(a) of the Act, 5 U.S.C. § 1005(a), provides:

> "So far as the orderly conduct of public business permits, *any interested person* may appear before any agency or its responsible officers or employees

> for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function."

And Section 6(d), 5 U.S.C. § 1005(d), requires that the agency give prompt notice "of the denial in whole or in part of any written application, petition, or other request of *any interested person* made in connection with any agency proceeding."

Even in the absence of Section 1.361(a) of the Commission's Rules and the special circumstances upon which the Commission relied in permitting petitioner to participate in the proceeding before it (p. 8, *supra*), there is no doubt that under Section 6(a) of the Administrative Procedure Act petitioner was entitled to file its objections to New Orleans' application. And, since there is no warrant for believing that the Congress meant something different by "any interested person" in Sections 6(a) and (d) of the Administrative Procedure Act from what it meant by "interested persons" in Section 4(b) of the same statute, it is plain that, as this Court stated in the *Storer* case, persons so entitled to participate in agency proceedings "might also intervene in appeals" under the similar language of Section 402(e).

Furthermore, in the passage that we have quoted from the *Storer* opinion this Court referred to both subsections (d) and (e) of Section 402 of the Communications Act. In doing so, it correctly recognized that they are to be read as two parts of an integrated statutory scheme. The notice of the filing and pendency of an appeal that must be given by the Commission pursuant to Section 402(d) to "each person shown by [its] records . . . to be interested in said appeal" is designed to do more than satisfy the curiosity or

academic interest of such persons. Its purpose is to assure that such persons will have the opportunity to exercise the right of intervention conferred upon them by the next succeeding subsection, Section 402(c). That this is so is made even clearer by consideration of this fact: Prior to 1952 the statutory notification of the filing of an appeal had to be given to "each person shown by the records of the Commission to be interested in such appeal *and to have a right to intervene therein under the provisions of this section.*" Communications Act of 1934, § 402(c), 48 Stat. 1093. In omitting the italicized clause in the 1952 amendments to the Communications Act, 66 Stat. 719, the Congress was simply deleting a redundancy. Although the report of the Senate Committee, where the amendments originated, treated the amendment to the judicial review provisions of the statute at some length, it did not even mention this change. See S. Rep. No. 44, 82d Cong., 1st Sess. 11-12 (1951) ("Subsection (d) would continue in effect, substantially, the provisions of section 402(c) of existing law."); *cf.* H.R. Rep. No. 1750, 82d Cong., 2d Sess. 16-18 (1952).

3. Finally, if the decision of the court below is allowed to stand it will produce the anomalous result that intervention will be liberally granted in some FCC review proceedings and narrowly restricted, as in this case, in scarcely distinguishable proceedings.

Where the Congress has dealt by statute with rights of intervention in proceedings to review administrative orders, it has conferred such rights in the same broad terms in which Section 402(c), if so read as to give effect to its plain meaning, confers them. These statutes include Section 8 of the Judicial Review Act of 1950, 5 U.S.C. § 1038, which governs review of, among

other things, orders of the Federal Communications Commission other than those from which appeals may be taken under Section 402(b). Section 8 provides, first, that any

> "parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right . . .."

and goes on to provide:

> "Communities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order."

The provision for intervention in proceedings to review orders of the Interstate Commerce Commission, 28 U.S.C. § 2323, is similar.[7] And under either statute it is clear that one in the position of petitioner here may intervene. See *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d 147, 151-52 (D.C. Cir. 1961);

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[7] Both of these statutes derive from the sections of the Mann-Elkins Act of 1910, 36 Stat. 539-44, that created the Commerce Court to review decisions of the Interstate Commerce Commission and provided for its procedures. See § 5, 36 Stat. 543. By the Urgent Deficiencies Act of 1913, which substituted three-judge district courts for the Commerce Court as ICC review tribunals, the Mann-Elkins Act procedural provisions were made applicable to proceedings before such courts. 38 Stat. 220. Under the Communications Act of 1934 review of Federal Communications Commission orders other than those subject to appeal to the Court of Appeals for the District of Columbia Circuit were to be had pursuant to the Urgent Deficiencies Act. § 402(a), 48 Stat. 1093. The Judicial Review Act of 1950 replaced the three-judge district courts with the courts of appeals and took over from the Urgent Deficiencies Act procedural provisions, including that dealing with intervention.

Nashville Grain Exch. v. *United States*, 191 Fed. 37, 39 (Commerce Ct. 1911), *rev'd on other grounds*, 235 U.S. 314; *Utah Citizens Rate Ass'n* v. *United States*, 192 F. Supp. 12, 15 (D. Utah 1960), *aff'd*, 365 U.S. 649; *Board of Pub. Util. Comm'rs* v. *United States*, 132 F. Supp. 379, 382 (D.N.J. 1955).

In the court below the Commission urged that a distinction as to the permissible scope of intervention between review proceedings under Section 402(a) of the Communications Act and appeals under Section 402(b) was justified on a policy ground. It said that petitions for review under Section 402(a) are typically from rule making proceedings in which a large number of persons may be directly affected, whereas in a licensing proceeding the number of persons directly affected is likely to be smaller. (R. 84-85). But at least since 1952, when the Commission adopted its over-all allocation of television channels, *Sixth Report on Television Allocations*, 1 Pike & Fischer Radio Reg. 91:599 (1952), most of the important Commission television rule making proceedings have looked toward changes in particular television channel assignments and have been very like licensing proceedings in the number of interested parties and the impact of the Commission's decision upon individual private interests. The court below so recognized in *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 224 (D.C. Cir. 1959), a Section 402(a) review of a rule making proceeding, when it agreed with the Department of Justice that "whatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege . . .."

Thus, as this Court said of another effort by the Government to explain why the procedure on appeal

from a Commission order should differ from the procedure on what was then review under the Urgent Deficiencies Act, "The considerations of policy which are invoked are as fragile as the legislative materials are inapposite." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14.[8]

The anomaly created by the decision below, whatever its ground, is aptly illustrated by this very case. The City of New Orleans differed from most other cities considered in the Commission's Docket No. 13340 in that Channel 12 had already been assigned and a construction permit had already been issued for that channel to serve the city—both consistent with Commission mileage separation requirements. Thus, the proceeding before the Commission to deviate from these requirements was on an application to modify the exist-

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[8] The only "legislative material" cited by the Commission or New Orleans below—and then only belatedly, in answer to petitioner's petition for reconsideration—is a passage in the report of the House Committee on 1952 amendments to the Communications Act. The passage is "inapposite." The 1952 amendments made only the most minor of wording changes in § 402(e). *Compare* § 402(d), 48 Stat. 1094, *with* § 402(e), 66 Stat. 719. The House Committee in its report paraphrased the first sentence of § 402(e) and then said, as to the second sentence, that "an 'interested party' is defined as any person who would be aggravated [sic] or whose interest would be adversely affected by a reversal or modification of the order of the Commission which is complained of." H.R. Rep. No. 1750, 82d Cong., 2d Sess. 17 (1952). Such a stock (and not altogether accurate) committee paraphrase of a statute long in effect that was in substance being re-enacted is a weak underpinning for an argument as to Congressional intent. The fact is that Congress in 1952 made no substantial change in § 402(e) and clearly did not mean to change its intent, which was, as we have seen, to grant the right of intervention broadly. This is demonstrated by the Senate Committee report on the same bill, which said, "Subsection (e) is a redraft of section 402(d) of existing law, with minor clarifying amendments." S. Rep. No. 44, 82d Cong., 1st Sess. 12 (1951).

ing construction permit, which is subject to appeal under Section 402(b). With respect to most other cities affected by the Commission's action in the omnibus case, rule making proceedings that may result in changes in allocation of television channels—not the grant of construction permits—were first necessary. Commission orders in these cases will be reviewable under Section 402(a). In substance and practical effect the proceedings are virtually identical. Petitioner is participating in those rule making proceedings, and there is no doubt that under Section 8 of the Judicial Review Act it will be able to intervene in any review that is had of any such proceeding whether it supports the Commission or the party petitioning for review. The artificial distinction created by the decision below between those cases and this one should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1963

APPENDIX A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

File No. BMPCT-5738

In re Application of

NEW ORLEANS TELEVISION CORPORATION (WVUA-TV)
New Orleans, Louisiana

For Modification of Construction Permit

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Lee dissenting and issuing a statement.

1. The Commission has before it for consideration (a) a "Petition to Designate For Hearing Or For Other Relief" filed on May 8, 1962 by St. Anthony Television Corporation (St. Anthony), permittee of Television Broadcast Station KHMA, Channel 11, Houma, Louisiana, directed against the above-captioned application of New Orleans Television Corporation (applicant), permittee of Television Broadcast Station WVUA-TV, Channel 12, New Orleans, Louisiana; (b) a "Petition to Deny" filed on May 11, 1962 by Capitol Broadcasting Company (Capitol), licensee of Television Broadcast Station WJTV, Channel 12, Jackson, Mississippi, directed against a grant of the above-captioned application; (c) "Objections of Association of Maximum Service Telecasters, Inc. to Grant" filed on May 11, 1962, directed against the above-captioned application; (d) a "Motion to Strike and Response To Objections of Association of Maximum Service Telecasters, Inc." filed on May 21, 1962 by applicant; (e) an "Opposition to Petition to Designate For Hearing" filed on May 21, 1962 by applicant; (f) an "Opposition To Petition To Deny" filed on May 24, 1962 by applicant; (g) an "Opposition To Motion To Strike And Reply To WVUA-TV" filed on June 1,

1962, by Association of Maximum Service Telecasters, Inc.; and (h) a "Reply To Opposition To Petition To Deny" filed on June 4, 1962 by Capitol Broadcasting Company.

2. On April 3, 1962[1], the applicant filed its application (BMPCT-5738) for modification of construction permit to decrease visual effective radiated power from 316 kw to 136.8 kw[2]; change studio location; change transmitter location from Socola, Louisiana to Paris Road near Back Protection Levee, east of Chalmette, Louisiana; change type of transmitter; change type of antenna; make other changes in equipment, and decrease antenna height above average terrain from 1320 feet to 1010 feet. In net effect, this application proposes to move the presently authorized site of Station WVUA-TV in the direction of New Orleans, to a site which is approximately 160 miles from the licensed site of Station WJTV, Channel 12, Jackson, Mississippi. Since this separation is less than the 190 miles required by Section 3.610 of the Commission's Rules, the applicant proposes to limit its radiated power in the direction of Station WJTV in order to provide "equivalent protection" to Station WJTV, as provided for in the Commission's Memorandum Opinion and Order of December 6, 1961 in Docket No. 13340, 21 R.R. 1710a.

3. St. Anthony Television Corporation, Capitol Broadcasting Company, and Association of Maximum Service Telecasters, Inc. (AMST) each oppose a grant of the present application. The standing of the first two parties has not been challenged; however, applicant has moved to strike the objections of AMST on the ground that it is not a "party in interest" in this proceeding. AMST has responded that its objections are filed pursuant to Section 1.361(a) of the Commission's Rules which allows "any person" to file objections to an application and, further,

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[1] Minor amendments to the application were filed July 5, 1962 but do not vary the problems discussed.

[2] Since a directional antenna is being employed, 316 kw will be furnished in the major lobe.

that in its Memorandum Opinion and Order of December 6, 1961 in Docket No. 13340, 21 R.R. 1710a, the Commission specifically provided that "interested parties may respond to the application" when a short-spaced application for Channel 12 in New Orleans was subsequently filed. Under these circumstances, and in view of the intimate interrelationship between the present proceeding and our previous conclusion in Docket No. 13340, we believe it appropriate to allow the limited participation sought by AMST.

4. For our action on the present application to be seen in proper perspective, it is necessary to recapitulate briefly the relevant history of the proceedings in Docket No. 13340. The Commission has been increasingly aware of the stark fact that the VHF channels presently available for assignment are insufficient to provide for a nationwide competitive television system. As a consequence of this shortage, the Commission has been faced with severe practical problems in the implementation of its associated long-term policy of fostering the development of at least three competitive television networks since, in too many markets, it has been impossible to assign a competitive third commercial VHF channel. The Commission's inability to make such assignments has, in turn, had the effect of partially blocking its efforts in developing three competitive networks. With this problem in view, the Commission instituted rulemaking in Docket No. 13340 in an effort to find a palliative which could serve to alleviate the critical need for additional channels in selected major markets in the interim period before full utilization of the UHF channels could be achieved[3]. As a result of the proceedings

[3] A significant development in this direction has been enactment of "all-channel receiver" legislation on July 10, 1962. In part, this legislation authorizes the Commission to require that all sets shipped in interstate commerce be capable of receiving UHF signals and, over a period of years, should provide a foundation for expansion in UHF as the chronic set conversion problem is dissipated.

in Docket No. 13340, the Commission concluded that the most efficient means of accomplishing its purpose would be to permit channel assignments at substandard spacings subject to the requirement that the new stations provide protection, in a manner specified by the Commission, to existing stations to assure that they not receive radiation in excess of the amount they are obligated to accept from a co-channel station operating with maximum facilities at full mileage separation. In view of the limitations inherent in such a technique, which necessarily limits its use only to exceptional cases, the Commission did not amend the minimum spacing requirements of Section 3.610 of the Commission's Rules, but a group of markets in which use of the "squeeze in" procedure would be considered. These markets conformed to the standards stated by the Commission in its Report and Order of July 27, 1961, in Docket No. 13340, *Interim Policy on VHF Television Channel Assignments*, 21 R.R. 1695, 1698, paragraph 11.

5. In its Memorandum Opinion and Order of December 6, 1961 in Docket No. 13340, 21 R.R. 1710a, issued in response to petitions for reconsideration, the Commission determined that New Orleans would be added to its select list of communities in which the pressing need for additional facilities justified further consideration of the "squeeze in" technique. As the Commission explained,

> "... Although Channel 12 is assigned to New Orleans it is persuasively argued that this factor presents no substantial reason why New Orleans should be treated differently than the other named cities since the station is not yet built ...
>
> "... Channel 12 may now be utilized at the required 190 miles separation to co-channel station WJTV, Jackson, Mississippi, and, under our rules, provide a signal of required strength to the city of New Orleans. Nevertheless, the Commission is of the opinion that considering the size of the market, the objective of this proceeding to strengthen nationwide competitive television, and the less than optimum benefits to be derived

from the use of Channel 12, 35 miles from the city, there is sufficient warrant to consider use of the channel at short spacing with equivalent protection provided to WJTV."

Interim Policy on VHF Television Channel Assignments, 21 R.R. 1710a, 1710f.

Since Channel 12 was already assigned to New Orleans, no further rule-making was required. However, the Commission stated that it would "enteretain an application to modify the outstanding construction permit for Channel 12 and interested parties may respond to the application," *Id.*

6. In support of its present application, the applicant has made an elaborate showing that its application satisfies the Commission's stated criteria, referred to in paragraph 4 above. In the main, the other parties have not taken issue with this contention. However, Capitol has advanced the argument that the status of Channel 12 is outside the scope of the criteria established for Docket 13340, since the Commission earlier excluded "suggestions that existing stations . . . be permitted to move closer in", 21 R.R. 1695, 1699, as being beyond the scope of the proceeding, and that the present application should therefore be dismissed as inconsistent with Docket 13340. This argument is directed to the merits of Docket 13340 and should, it would seem, have been raised in that proceeding by timely filed petition for reconsideration of our action of December 6, 1961. *Skyway Broadcasting Company*, 19 R.R. 1149, 1150. In any event, as we explained in our earlier action, we consider the fact that the Channel 12 station has not been built as sufficient basis to distinguish the instant situation, and, consequently, we herewith reaffirm our earlier determination that the status of New Orleans Channel 12 was properly within the scope of Docket 13340.

7. A variation on the argument discussed in paragraph 6, above is advanced both by AMST and by Capitol as each urges that action on the present application should be de-

ferred pending final action in Docket Nos. 14231-14238, the separate outstanding rule-making proceedings proposing substandard assignments to specific communities deriving from Docket 13340, in order to avoid the risk of prejudgment in those proceedings. This argument ignores the fact that the Commission is already committed to the consideration of the use of substandard spacings in appropriate circumstances to alleviate the critical need for additional VHF assignments in major markets to foster the nationwide competitive television system envisioned by the Commission. Thus, the only problem facing the Commission either here or in the cited dockets is the appropriateness of the proposed solution to the particular factual situations involved, and action in any one specific situation can not, therefore, prejudge the others. There is additional need for dispatch in the present situation since the applicant is temporarily operating on Channel 13, assigned to Biloxi, Mississippi, pending completion of construction of a station to operate on Channel 13 in Biloxi. Since the permittee in Biloxi has indicated that it expects to complete its construction and be ready for operation soon, there is every warrant for a speedy resolution of the present proceeding.

8. A further policy argument advanced by AMST and by Capitol is that the present application should be rejected as a matter of policy in view of the fact that applicant has an authorized site meeting the requirements of the Commission's Rules, notwithstanding the fact that it is located 35 miles from the principal community to be served. Thus, it is urged that there is no need for a grant of the present substandard proposal since applicant can, in any event, furnish a technically satisfactory signal to New Orleans. This argument is obviously entitled to weight, and might even be decisive, if we were concerned only with adjudication of the private rights of the parties. Such is not the case here. The problem with which the Commission grappled in Docket No. 13340 was the fostering of a nationwide competition network situation. To accomplish this

purpose it is necessary to assure the availability of competitive facilities to the networks within the major markets, for the economic ability of a network to survive and furnish the public with the benefits of its operation hinges ultimately on its access to competitive facilities within the major markets. By assuring the existence of a third *competitive* station in New Orleans, the Commission benefits not only the viewing public of that city but, ultimately, the public of the entire nation. We believe that the benefits to be derived from furtherance of this policy justify the use of Channel 12 in New Orleans at substandard spacings. 21 R.R. 1710a, 1710e.

9. AMST and Capitol have attacked the applicant's proposed use of equivalent protection on three grounds. First, both have urged that the failure of the application to specify such matters as the use of a reference antenna shows that the application does not conform to the requirements established in Docket No. 13340. The applicant's responsive pleadings show that it does contemplate the use of such an antenna but that it did not consider it a matter appropriate for inclusion in our standard application form, FCC Form 301. We are mindful of an obligation to assure Capitol that it will receive the full measure of protection to which it is entitled under our decision, and, for this reason, we are adding appropriate conditions, set forth below, which we consider adequate to accomplish this purpose. Moreover, in the event that questions should subsequently arise regarding the applicant's operation, we will direct every effort toward assuring the requisite protection to Capitol. The second objection, advanced by Capitol alone, is that the computation of the mileage separation to which it is entitled is erroneous since it should be based on Zone III standards rather than Zone II standards. Station WJTV lies in Zone II, as defined by Section 3.699 of the Commission's Rules, while New Orleans is in Zone III. Section 3.610(b)(2) of the Rules provides, in relevant part, that "the minimum co-channel mileage separation between a station

in one zone and a station in another zone shall be that of the zone requiring the *lower* separation" (emphasis added). Nonetheless, Capitol argues that since it lies just within Zone II the path over which radiation will be transmitted is exclusively within Zone III and that, therefore, it should be entitled to protection as though it too were a Zone III station. This argument is readily answered. WJTV is by definition a Zone II station. Consequently, it is not entitled to more protection than that being proposed by the applicant, since even if the applicant were to locate in full conformance with the separation requirement, WJTV would still receive the interference against which it is not protected under the present Commission Rules. And it is for this reason that Capitol's reliance on *American Broadcasting Company-Paramount Theatres, Inc. v. Federal Communications Commission*, ___ F.2d ___, 23 R.R. 2020, is misplaced, since interference could have been avoided in that case whereas here a certain amount must result in any event. Third, and last, AMST advances its general view that the Commission's standards of equivalent protection do not in fact provide protection against co-channel interference equivalent to that provided by the mileage separation requirements. This argument, standing unrelated to the particular facts here at issue, is irrelevant since we have already determined, in the abstract, the need for the use of this technique. As we stated in our opinion on reconsideration in Docket No. 13340, in specific response to comments by AMST, "the entire subject of new interference can be thoroughly examined in the individual proceedings," 21 R.R. 1710a, 1710g. However, since AMST has not attempted to make any showing regarding the specific proposal here at issue, we do not believe it either necessary or appropriate to launch on an abstract discussion of a technical engineering matter which has not been directly related to this proceeding.

10. Capitol has further claimed a right to a prior evidentiary hearing pursuant to Section 316 of the Communi-

cations Act. That statutory provision, among other things, requires the Commission to afford licensees an opportunity to demonstrate, in an evidentiary hearing, why an order of modification of a license should not become final. It is the Commission's position, however, that Section 316 should not apply in the present case. Our action in Docket No. 13340 and our action granting the present application would not change either Capitol's facilities or its mode of operating Station WJTV. The other type of situation in which Section 316 rights have been recognized occurs when there is a *de facto* modification of a broadcast license through authorization to another station to radiate signals which create interference to the licensee's service within the area in which it is entitled to protection under the Commission's Rules. Section 3.612 of the Rules requires a television licensee to accept the degree of interference which results from the establishment of a station of maximum antenna height and power at the minimum indicated co-channel separation. Under the conditions imposed on the applicant, Station WJTV will not be required to receive a greater degree of interference from the applicant's proposed station than if it were operating at standard spacing with the full facilities to which it is entitled under the Commission's Rules. In these circumstances, it is clear that a grant of the present application would not modify Station WJTV's license and that, accordingly, it is not entitled to a hearing under Section 316 of the Communications Act. *Amendment of Section 3.606, Table of Assignments, Television Broadcast Stations (Syracuse and Rochester, New York,)*, 21 R.R. 1754, 1761-1762.

11. St. Anthony, permittee of Station KHMA, Houma, Louisiana, objects that the present application falls short[4] of the minimum adjacent channel separation of 60 miles

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[4] Although St. Anthony originally claimed that the separation would be only 52.7 miles, it appears that approximately 55 miles is the correct figure.

established by Section 3.610(c) of the Commission's Rules. Consequently, it asserts its right to a hearing.[5] As an alternative, it proposes that the Commission grant its pending application (BMPCT-5400) for modification of its outstanding construction permit to specify a site at Geismar, Louisiana, which satisfies the adjacent channel separation requirement to applicant's proposed site. However, action on the St. Anthony application is being withheld pending final action in Docket No. 14233 in which reassignment of Channel 11 From Houma to Baton Rouge is proposed. The Commission determined in Docket No. 13340 that equivalent protection would not be extended to adjacent channel stations. St. Anthony has not attacked this conclusion nor has it made any attempt to show the existence of special circumstances or interference conditions which would warrant a hearing on the application. Under these circumstances, we believe it appropriate simply to point out that this matter was effectively settled in Docket No. 13340, 21 R.R. 1699, 1700, 1710g. Aside from this, it is appropriate to note that St. Anthony has held a construction permit since November, 1958, without constructing its proposed station. While it is clear that St. Anthony wishes to pursue various alternatives before settling the question of Station KHMA's site, it is equally clear that St. Anthony has no present intention of constructing, before final settlement of its alternative proposals. Under these circumstances, and in view of St. Anthony's expressed desire to change site, it is clear that it would be futile to grant St. Anthony a hearing which could have but one result. Accord, *L. B. Wilson, Inc.* 20 R.R. 1021, 1022.

12. The voluminous pleadings filed in this proceeding have raised a number of other matters which we do not con-

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[5] AMST has also urged that both Capitol and St. Anthony must be afforded hearings pursuant to Section 316 of the Communications Act. However, although we feel AMST should be allowed to have its objections considered, we do not believe it appropriate here to allow it to assert statutory rights which do not run to it.

sider it necessary to discuss *seriatim* in view of our stated bases for the disposition of the arguments advanced; however, all of these matters were carefully considered. In this connection, although the matter has not been raised by the parties, we believe it appropriate to note that we have carefully weighed the gains and losses of predicted coverage to populations and areas which will result from a grant of the application. We find that there will be a substantial net gain in coverage as a result of the move. In addition, the entire area which would lose a predicted Grade B signal as a result of the move is swampland where few people reside.

13. In view of the foregoing, the Commission concludes that no substantial or material questions of fact have been presented by the pleadings, and that the petitioners have failed to establish that grant of the above-captioned application would be *prima facie* inconsistent with the public interest. The Commission finds further that the requested waiver of Section 3.610(c) of the Rules is warranted and that grant of the above-captioned application would serve the public interest, convenience and necessity.

Accordingly, It Is Ordered, That New Orleans Television Corporation's Motion to Strike AMST's objections, Is Denied; that the requested waiver of Section 3.610(c) of the Rules Is Granted; That the application (BMPCT-5738) of New Orleans Television Corporation Is Granted Subject To The Following Conditions:

1. The construction authorized shall have no adverse effect on the operation of WTIX(AM). Sufficient field strength measurements shall be made before and after construction of the TV antenna to prove that no material effect on the WTIX(AM) operation has resulted.

2. The horizontal effective radiated visual power in the direction of Station WJTV, Jackson, Mississippi, shall not exceed 17.2 dbk(52.5kw).

3. An appropriate reference antenna shall be installed on the main antenna structure for the purpose of making ratio field intensity measurements with the transmitting antenna in the direction of Station WJTV at the time of initial operation and subsequent periodic checks during regular operation. The reference antenna shall be installed in a manner to minimize coupling to the main antenna elements, the tower structure, and guy wires. Provisions shall be made for coupling the transmitter output either to the reference antenna or to the main transmitting antenna and suitable means shall be available for accurately determining and maintaining the relative power inputs to the main and reference antennas.

4. Monitoring locations shall be selected for the purpose of obtaining relative field intensity measurements between the reference and main antenna to establish that the limited radiation specified above in the direction of WJTV is not exceeded. At least two monitoring locations on the radial connecting the WVUA-TV transmitting antenna and Station WJTV shall be selected. Comparative radiation measurements of the WVUA-TV transmitting antenna shall be made during equipment tests and at least once each 90 days at the selected monitoring locations. Records of such measurements shall be maintained and made available to the Commission upon request.

5. Suitable means shall be provided for monitoring the visual power inputs to the two main branches of the main transmitting antenna during normal operation.

6. The application for license shall include the following:

(a) Horizontal plane radiation pattern obtained from measurements performed by the manu-

facturer for the transmitting antenna prior to its installation.

(b) Vertical radiation patterns obtained from measurements by the manufacturer for the transmitting antenna prior to its installation for at least the azimuths toward Station WJTV.

(c) An affidavit by a qualified and licensed surveyor that the proper azimuthal orientation of the transmitting antenna to achieve the radiation limitations prescribed above for Station WJTV was established at the time of the antenna installation.

(d) Description of the reference anter ıa installation with appropriate measured radiation patterns.

(e) Description of monitoring locations on the radial connecting the WVUA-TV transmitting antenna and Station WJTV.

(f) Comparative field intensity measurements obtained during equipment tests between the reference and main antenna at the selected monitoring points together with a description of equipment and technique employed.

(g) Description of means employed to monitor power input to the reference antenna and the relative power inputs to the two main branches of the transmitting antenna together with calibration and sample power measurements.

It Is Further Ordered, That AMST's objections, upon due consideration, Are Denied; that St. Anthony Television Corporation's "Petition to Designate for Hearing or For

Other Relief" Is Denied; and that Capitol Broadcasting Company's "Petition to Deny" Is Denied.

Federal Communications Commission*

Ben F. Waple
Acting Secretary

Adopted: July 25, 1962
Released: July 31, 1962
*See attached dissenting statement of Commissioner Lee.

Dissenting Statement of Commissioner Robert E. Lee

I dissent to the action of the majority in approving the construction of WVUA-TV at a site 30 miles short to a co-channel station and 5 miles short to an adjacent channel station.

It is clear that from the site heretofore authorized, the station places a principal city signal to New Orleans. Accordingly, there is no justification for the instant authorization particularly in view of the violence done to our technical standards.

I fail to see how the Commission intends to preserve VHF service and how it intends to keep UHF stations from jumping onto the bandwagon whereby sub-standard VHF stations apparently are to be made available to everyone possessing other requisite qualifications.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,258

CAPITOL BROADCASTING COMPANY, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
NEW ORLEANS TELEVISION CORPORATION, *Intervenor*,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC., *Intervenor*,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Intervenors*.

Before Bazelon, Chief Judge, and Bastian, Circuit Judge, in Chambers.

ORDER

On consideration of the motions of appellee and intervenor New Orleans Television Corporation, to dismiss the notice of intention to intervene filed by Association of Maximum Service Telecasters, Inc., and of the oppositions thereto filed, it is

ORDERED by the court that the motions be granted and that the notice of intention to intervene of Association of Maximum Service Telecasters, Inc., is hereby dismissed.

Per Curiam.
November 16, 1962

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,258

CAPITOL BROADCASTING COMPANY, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
NEW ORLEANS TELEVISION CORPORATION, *Intervenor*,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Intervenors*.

Before Bazelon, Chief Judge, and Bastian, Circuit Judge, in Chambers.

ORDER

On consideration of the petition of Association of Maximum Service Telecasters, Inc., for reconsideration, by the division, of the order entered herein on November 16, 1962, and of the responsible pleadings, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

January 10, 1963

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,258

CAPITOL BROADCASTING COMPANY, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
NEW ORLEANS TELEVISION CORPORATION, *Intervenor*,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Intervenors*.

Before Bazelon, Chief Judge, and Edgerton, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger and Wright, Circuit Judges, in Chambers

ORDER

On consideration of the petition for reconsideration of Association of Maximum Service Telecasters, Inc., for reconsideration en banc, of the oppositions thereto filed by appellee, and intervenor New Orleans Television Corporation, of appellant's answer to the petition, and of said movant's reply, it is

ORDERED by the court that the aforesaid petition is hereby denied.

Per Curiam.
January 10, 1963

Circuit Judge Wright did not participate in the foregoing order.

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No. 899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, NEW ORLEANS TELEVISION CORPORATION, CAPITOL BROADCASTING COMPANY, and AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE RESPONDENT NEW ORLEANS TELEVISION CORPORATION IN OPPOSITION

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IN THE

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No. 899

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, NEW ORLEANS TELEVISION CORPORATION, CAPITOL BROADCASTING COMPANY, and AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT NEW ORLEANS TELEVISION CORPORATION IN OPPOSITION

STATUTES AND REGULATIONS INVOLVED

In addition to Section 402 of the Communications Act of 1934, 48 Stat. 1093, as amended, 66 Stat. 718, 47 U.S.C. § 402, quoted in part in the petition for a writ of certiorari (pp. 3-4), this case also involves Section 1.361(a) of the Commission's rules and regulations, which provides in pertinent part, 47 C.F.R. § 1.361(a):

> "(a) Before Commission action on any application for an instrument of authorization, other than a license pursuant to a construction permit, any person may file informal objections to the grant. * * *"

QUESTION PRESENTED

Whether any person may, as a matter of statutory right, intervene and participate in an appeal from an order of the Federal Communications Commission, where the statute, in defining the procedure for an "interested person" to secure status as a party intervenor, declares:

> "Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission shall be considered an interested party."

47 U.S.C., § 402(e) and the circumstances are:

(1) The person seeking intervention would not be "aggrieved" nor would its interest be "adversely affected" by a *reversal* or *modification* of the order complained of, because it seeks to intervene *in support* of the appeal and *in favor* of reversal or modification;

(2) While claiming a general "interest" in the subject matter of the appeal, the person seeking intervention has not been "aggrieved" nor has its interest been "adversely affected" by the Commission's action under review; and

(3) The person had been permitted to file pleadings before the Commission under a Commission rule which provides that "any person may file informal objections to the grant" of an application of the nature granted, 47 C.F.R., § 1.361(a), but seeks to intervene on appeal as an "interested person."

STATEMENT OF THE CASE

In a general rule making proceeding in Docket No. 13340, the Federal Communications Commission adopted a policy that it would waive those requirements of its rules and regulations which specified minimum separations between television stations operating on the same channel, under special circumstances in a limited number of specified major markets of the United States. *Interim Policy on VHF TV Channel Assignments*, 21 Pike & Fischer Radio Reg. 1695 (1961). A detailed procedure was defined to be followed by any newly authorized station to suppress radiation in the direction of an existing co-channel station "to the extent necessary to provide equivalent protection to that which the existing station would enjoy if the new station were operating with full power at the standard minimum separation." 21 Pike & Fischer Radio Reg. at 1709. On a petition for reconsideration filed by the respondent New Orleans Television Corporation, the Commission determined that New Orleans would be added to its list of communities where reduced separations would be considered, since a Channel 12 station at regular spacings could only be placed 35 miles down river from New Orleans. 21 Pike & Fischer Radio Reg. at 1710f. Since Channel 12 was already assigned to New Orleans, the Commission stated no further rule making would be required, and it would "entertain an application to modify the outstanding construction permit for Channel 12 and interested parties may respond to the application." *Ibid.*

Petitioner Association of Maximum Service Telecasters, Inc. [not to be confused with the National Association of Broadcasters, the national trade association for radio and television licensees], is the repre-

sentative of a group of "approximately 150 television stations" (thus comprising less than one-fourth of the 570 commercial and 68 non-commercial television stations in the United States), which opposed the reduced-separation policy and equivalent-protection procedure adopted in the Docket No. 13340 general rule making proceeding.

Acting in response to the Commission's invitation in Docket No. 13340 and in strict conformity with its specifications and requirements, the respondent New Orleans Television Corporation, which held a permit for a station at regular spacings at a site 35 miles from New Orleans, filed an application to move its transmitter site to New Orleans at reduced spacings (FCC R. 2, 17). A petition to deny was filed by the respondent Capitol Broadcasting Company, the licensee of a co-channel station at Jackson, Mississippi (FCC R. 68-94), and a petition to designate the application for hearing by the permittee of an unconstructed Channel 11 station at Houma, Louisiana (which has not participated in appellate proceedings) (FCC R. 62-67). The petitioner Association (AMST) filed "Objections * * * to Grant" (FCC R. 110-115) under Section 1.361(a) of the Commission's rules and regulations, 47 C.F.R., § 1.361(a), which provides that "any person may file informal objections to the grant" of an application for an instrument of authorization, with one exception not here pertinent. Over objections by the respondent New Orleans Television Corporation that the Association was not a "party in interest," the Commission concluded, "we believe it appropriate to allow *the limited participation sought* by AMST" (emphasis added), *New Orleans Television Corp.*, 23 Pike & Fischer Radio Reg. 1113, 1115 (1962).

By memorandum opinion and order released on July 31, 1962, the Commission considered and rejected the contentions of the pleadings filed in opposition, and granted without hearing the application of New Orleans Television Corporation for modification of its construction permit to specify a transmitter site at reduced separations, with detailed conditions for affording equivalent protection to the co-channel Jackson station. *New Orleans Television Corp.*, 23 Pike & Fischer Radio Reg. 1113 (1962).

Pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C., § 402(b)(6), the respondent Capitol Broadcasting Company, the licensee of the co-channel Jackson station, filed an appeal from the order of the Commission granting the New Orleans authorization before the United States Court of Appeals for the District of Columbia Circuit (R. 109). Notices of intention to intervene were separately filed by the respondent New Orleans Television Corporation, by the respondent American Broadcasting-Paramount Theatres, Inc., and by the petitioner Association of Maximum Service Telecasters, Inc.

Motions to strike the petitioner Association's notice of intention to intervene were filed by the Commission and by New Orleans Television Corporation, on the ground that the petitioner would not be aggrieved or its interest adversely affected by reversal or modification of the Commission's order, and thus was not an "interested party" within the definition of Section 402(c) of the Communications Act governing intervention, and also on the ground that its asserted interest as an Association of limited membership in "high technical quality" television service to the public

did not establish that it was "aggrieved" or its interest was "adversely affected" by the Commission's grant sufficiently to support intervention as an "interested person" under Section 402(e) of the Act (R. 33-36, 44-49).

On November 16, 1962, a division of the United States Court of Appeals granted the motions of the Commission and New Orleans Television Corporation, and dismissed without opinion the notice of intention to intervene of the Association (R. 66). A "Petition for Reconsideration and/or Reconsideration En Banc" was filed by the Association, was opposed by the Commission and by New Orleans Television Corporation, and was denied without opinion by orders entered January 10, 1963, by the division of the Court and by the Court en banc (R. 93, 94).

On January 30, 1963, the Association filed with the United States Court of Appeals a "Motion for Leave to File Brief Amicus Curiae and to Participate in Oral Argument." On objection by New Orleans Television Corporation, the Court granted leave to the Association to file a brief as amicus curiae but denied its request for leave to participate in oral argument. The filing of briefs before the United States Court of Appeals is being completed, and oral argument before the Court is scheduled for April 19, 1963.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI FAILS TO ESTABLISH AN ADEQUATE BASIS FOR CONSIDERATION BY THIS COURT

No important question of federal law is presented which has not been, but should be, settled by this Court. The provision for intervention, with its antecedents,

has been in effect for thirty-three years without challenge. Section 402(c) of the Communications Act of 1934, as amended, is derived from a 1930 amendment of Section 16 of the Radio Act of 1927. See Public Law No. 494, 71st Cong., 2d Sess., 46 Stat. 844 c. 788. The circumstance that petitioner's interpretation has never been heretofore litigated suggests that the limitations upon intervention set forth in the Communications Act are clear and plain upon their face, and that there is no great precedent potential in the Court's dismissal of petitioner's intervention, since it merely represents an application of existing law.

That the United States Court of Appeals below has conclusively determined on three occasions without dissent, twice by a division of the Court and once by the Court en banc, that petitioner had no standing to participate of right as a party intervenor in the appeal, and found it unnecessary to set forth the grounds for its disposition, further suggests that no substantial question was raised.

II. THE DISMISSAL OF PETITIONER'S NOTICE OF INTENTION TO INTERVENE WAS CLEARLY CORRECT UNDER THE TERMS OF THE APPLICABLE STATUTE

A. Petitioner Would Not Be Aggrieved Nor Would Its Interest Be Adversely Affected By Reversal Or Modification

Section 402(c) of the Communications Act of 1934, as amended, is carefully drawn to limit intervention only to "any interested person," and to define with precision what constitutes such an interested party:

> "Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with

> proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party."

Legislative history similarly reflects the intention of the Congress to limit intervention under Section 402(b) to those who support the order complained of, i.e., those "who would be aggrieved or whose interest would be adversely affected by a *reversal* or *modification* of the order" (emphasis added). The House Committee Report on the 1952 Amendments to the Communications Act, H.Rept. No. 1750 (82nd Cong., 2d Sess.), 1952, stated:

> "Subsection (e) provides that within 30 days after the filing of any such appeal any interested person may intervene and participate in the proceedings by filing with the court a notice of intention to intervene and a verified statement of the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. An 'interested party' is defined as any person who would be aggravated [sic] or whose interest would be adversely affected by a reversal or modification of the order of the Commission which is complained of."

In light of the specific statutory language defining intervention under Section 402(e), other provisions of other statutes permitting broader intervention in different circumstances (e.g., in appeals from rule making actions, where a much larger number of persons may be directly affected) reflect a different Congressional purpose and are here inapposite.

B. Petitioner Was Not "Aggrieved" Nor Was Its Interest "Adversely Affected" to Support Intervention

Judicial procedure on appeal is not so casual and indiscriminate as to permit every intrusion into proceedings before the Court, but requires a showing of "interest" to support intervention and participation. Under Section 309(c) of the Communications Act of 1934, as amended, 47 U.S.C., § 309(c), "A 'party in interest' is one who is 'aggrieved or whose interests are adversely affected' (§ 402(b))." *Metropolitan Television Company* v. *United States*, 95 U.S. App. D.C. 326, 221 F. 2d 879, 880 (1955); cf. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940). The statutory language of Section 402(e) of the Act utilizes the same language in defining an "interested party" with standing to intervene upon appeal.

The status of petitioner as an association of a limited number of television stations, and its asserted interest in the continuation of television service to the public of high technical quality, manifestly did not establish to any degree that it was "aggrieved" or that its interest would be "adversely affected" by the Commission's grant of the New Orleans application. A television station in Rochester, New York, or Kansas City, Missouri, manifestly can have no substantial or direct interest in a television assignment in New Orleans; their combination with others into a group for some special purposes such as intervention can operate to confer no greater rights. If a member station is directly affected, it has an adequate remedy in its own right to appeal, as exercised by the co-channel Jackson station licensee.

The Association's participation in Docket No. 13340 was in a general rule making proceeding open to all

members of the public. Allowance of "the limited participation sought" by the Association in the Commission's consideration of the New Orleans application was based upon a rule of procedure of the Commission, 47 C.F.R., § 1.361(a), likewise permitting any member of the public to file informal pleadings. Certainly it would be a most curious inversion of the administrative process to authorize a person who was granted leave to file objections as any member of the public might do to acquire standing to prosecute an appeal upon the denial of its objections.

Standing to intervene in a judicial proceeding is a matter for judicial determination. The clerical function performed in the office of the Commission of giving notice to the Association that an appeal had been filed by the co-channel Jackson licensee obviously could confer no standing to intervene where it did not otherwise exist. The United States Court of Appeals properly dismissed the Association's notice of intention to intervene.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 899

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion and Order of the Federal Communications Commission (Pet. App. 1a–14a)[1] granting the application of New Orleans Television Corporation for modification of the construction permit for television broadcast station WVUA–TV is not officially reported. It is reported unofficially at 23 Pike & Fischer, Radio Regulation 1113. The order of the court of appeals (Pet. App. 15a) dismissing petitioner's notice of intention to intervene, the order (Pet. App. 16a) of the same panel

[1] References to "Pet. App." are to the appendix to the petition.

denying reconsideration, and the order (Pet. App. 17a) of the court denying reconsideration *en banc*, have not been reported.

JURISDICTION

The order of the court of appeals dismissing petitioner's notice of intention to intervene was entered on November 16, 1962. The order of the same panel denying reconsideration, and the order denying reconsideration *en banc*, were both entered on January 10, 1963. The petition for a writ of certiorari was filed on March 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, a trade association of certain television stations, sought to intervene in the appeal of one of its members from a Federal Communications Commission decision authorizing a change in the transmitter site of another, nonmember station. Appellant had alleged that the change might result in an increase in electrical interference with its own broadcasts and that the grant thus constituted an unlawful modification of appellant's license. The question presented is whether under Section 402(e) of the Communications Act of 1934, petitioner had standing to intervene in the appeal of its member station.

STATUTES INVOLVED

Section 402 of the Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 47 U.S.C. 402, provides in pertinent part:

* * * * *

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

* * * * *

(6) By any person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application [for the grant, renewal, or modification of, or for authority to transfer or assign or dispose of, a station license or construction permit, or for a permit under 47 U.S.C. 325].

* * * * *

(c) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

STATEMENT

On July 25, 1962, the Federal Communications Commission, in a Memorandum Opinion and Order released July 31, 1962 (Pet. App. 1a–14a), granted without a hearing the application of New Orleans Television Corporation (New Orleans Television) for modification of its outstanding construction permit for

television station WVUA-TV, Channel 12, New Orleans, Louisiana, thereby authorizing the applicant to move its transmitter site from a point about 35 miles from the city to a site closer to New Orleans.

In permitting this move in order to improve competitive conditions in New Orleans, the Commission waived its rules requiring a 190-mile spacing between WVUA-TV and station WJTV, on the same channel at Jackson, Mississippi, since the move of WVUA-TV brought it closer to WJTV and within 190 miles of the WJTV transmitter. Although the Commission imposed conditions upon New Orleans Television designed to provide WJTV's signal with protection equivalent to that afforded by the mileage separation rule, Capitol Broadcasting Co. (the owner of WJTV) alleged that additional electrical interference would result and that grant of the application was a modification of its license under Section 316(a) of the Communications Act, 47 U.S.C. 316(a). See *Federal Communications Commission* v. *National Broadcasting Co.* (KOA), 319 U.S. 239.

Petitioner Association of Maximum Service Telecasters, Inc. (of which Capitol is a member) also participated in the Commission proceeding, over the objections of New Orleans Television which challenged petitioner's standing on the ground that it was not a "party in interest" who could file a petition to deny under Section 309(d)(1) of the Act, 47 U.S.C. 309 (d)(1).[2] In response, petitioner specifically dis-

[2] Section 309(d)(1) provides: "Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection

claimed any intention to participate as a "party in interest" under Section 309 of the Act, and argued that a wider category of "interested parties" should be permitted to respond to the New Orleans Television application than those entitled to file petitions to deny under Section 309.[2] The Commission agreed, noting that Section 1.361(a) of its Rules, 47 C.F.R. 1.361(a), permits "any person" to file informal objections to an

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(b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit."

[2] See petitioner's "Opposition to Motion to Strike And Reply to WVUA-TV" at p. 204 in the original record filed by the Commission below, which has been transmitted to this Court (hereinafter "F.C.C.R."). It should be noted that Section 309(e), 47 U.S.C. 309(e), provides that when an application is designated for hearing, "parties in interest" shall be entitled to participate in the hearing. See *Elm City Broadcasting Corp. v. United States*, 235 F. 2d 811 (C.A.D.C.), construing this requirement as it formerly appeared as Section 309(b) of the Act, 47 U.S.C. (1958 ed.) 309(b).

application,[4] and that in an earlier general rule-making proceeding concerning the question of short-spaced assignments (in which petitioner had participated) the Commission had stated that "interested parties may respond to the application" of New Orleans Television when the request for a short-spaced assignment at New Orleans should be filed (Pet. App. 2a–3a). The Commission found it appropriate to allow "the limited participation sought by [petitioner]" (Pet. App. 3a).

The Commission granted New Orleans Television's application without hearing, and Capitol appealed to the court below. Petitioner, however, did not file an appeal. It filed instead a "Notice of Intention of Association of Maximum Service Telecasters, Inc., To Intervene" (R. 15–22)[5] in the Capitol appeal, stating that the questions raised by the appeal were of vital interest to petitioner and its members (R. 17–19). The Commission, on October 3, 1962, filed a "Motion To Dismiss Notice of Intention To Intervene of The Association of Maximum Service Telecasters, Inc.," on the ground that petitioner was not an interested

[4] Section 1.361(a) provides: "Grants without hearing of authorizations other than licenses pursuant to construction permit; procedure for filing informal objections.—(a) Before Commission action on any application for an instrument of authorization, other than a license pursuant to a construction permit, any person may file informal objections to the grant. Such objections shall be signed by the objector. The limitation on pleadings and time for filing pleadings provided for in § 1.13 shall not be applicable to any objections duly filed under this section."

[5] References to "R" are to the record of proceedings in the Court of Appeals.

party under Section 402(e) of the Communications Act in that it would not be adversely affected by a reversal or modification of the Commission's order (R. 33–36). Petitioner opposed this motion on October 11, 1962 (R. 37–43). On October 12, 1962 New Orleans Television, which had itself intervened in the court of appeals, also moved to dismiss petitioner's notice of intervention. It agreed with the Commission's position and also urged that petitioner did not have a sufficient degree of interest to intervene, even if persons aggrieved by a Commission order, as well as those who would be aggrieved by its reversal, are proper intervenors (R. 45–48). This motion was opposed by petitioner on October 19, 1962 (R. 50–60).

By order of November 16, 1962, the court below, "[o]n consideration of the motions of appellee and intervenor New Orleans Television Corporation," granted the motions and dismissed the notice of intention to intervene (Pet. App. 15a). On December 1, 1962, petitioner filed a petition for reconsideration and/or reconsideration *en banc* (R. 67–82). This petition asserted, *inter alia,* that, "The Court's Order does not indicate whether one or both of these arguments [of the Commission and New Orleans Television] were accepted, or whether the Order was based on some other ground" (R. 68). Petitioner requested that, if reconsideration were denied, the court indicate the grounds for its dismissal order "so as to facilitate AMST's determination whether to file a Petition for Certiorari and, if one is filed, to permit its meaningful

consideration by the Supreme Court" (R. 69). Both the Commission (R. 83–87) and New Orleans Television (R. 88-92) opposed the petition for reconsideration.

On January 10, 1963 the same panel which had issued the dismissal order denied reconsideration (Pet. App. 16a), and the court *en banc* (Judge Wright not participating) also denied reconsideration (Pet. App. 17a).

On January 30, 1963, petitioner filed a motion for leave to file a brief *amicus curiae* and to participate in oral argument. This motion was opposed by New Orleans Television, but not by the Commission. By order of February 18, 1963 the court below allowed petitioner to file a brief as *amicus curiae*, but denied the request for oral argument.

ARGUMENT

The court of appeals properly dismissed petitioner's notice of intention to intervene. Its action presents no question of general importance warranting review by this Court.

1. In the first place, petitioner is not prejudiced by the order below. It is an association of television stations one of whose members claims specific injury from a Commission order permitting New Orleans Television to move its transmitter. The member station, Capitol, is prosecuting an appeal to the court below; thus, petitioner cannot claim the need to represent the interest of injured members as in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449. Petitioner and its other members do not assert any specific in-

jury from, or interest in, the order on review below. They have, rather, an interest common to many persons in the industry in the precedent set by the Commission decision insofar as it might affect future situations. This interest of petitioner is of the type commonly advanced as the basis for *amicus* participation, and it is satisfied by the order of the court of appeals which allowed it such participation.

2. The ruling below, moreover, is in accord with the provision of the Communications Act governing intervention in the court of appeals. The proceeding below is an appeal from an order granting modification of a construction permit, brought under Section 402(b), 47 U.S.C. 402(b). Section 402(c) authorizes "any interested person" to intervene in an appeal filed pursuant to Section 402(b) of the Act, 47 U.S.C. 402(b), and defines an interested person as "Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of * * *." Petitioner is not an interested person within the plain terms of Section 402(c). It does not contend that it would be adversely affected by a reversal or modification of the Commission's order; rather, it opposes the order and urges its reversal.

This straightforward reading of Section 402(c) is, contrary to petitioner, quite consistent with the Congressional purpose. The predecessor to Section 402 (b) and (c) was enacted in 1930, 46 Stat. 844, 845, to correct inadequacies in the 1927 Radio Act's provisions for judicial review. The right of appeal was then

available only to persons whose applications had been denied, but not to persons who, like Capitol Broadcasting, would be injured by the grant of another's application. This defect was stressed by a committee of the American Bar Association, whose report, cited by petitioner, pointed out that a licensee in Capitol's position was permitted neither to appeal from a Commission order granting an injurious application, nor to intervene in support of an order denying such an application. 54 A.B.A. Rep. 461 (1929).* Both of these lacunae were filled with precision in the 1930 legislation. First, Section 402(b) extended the right of appeal, theretofore available only to applicants, to all persons "aggrieved or whose interests are adversely affected by" a Commission order. Second, the prede-

*To illustrate the unsatisfactory state of the law, the report offers the following example of a party claiming injury from short-spacing (54 A.B.A. Rep. 461; emphasis in original): "No right of appeal is given to a licensee whose rights under an existing license or construction permit may be vitally injured or destroyed by the granting of *another's* application. If A applies for authority to operate a 1,000-watt station on a channel occupied by B's station 400 miles away, and if the Commission grants the application, B's service area may be reduced to a small circle immediately surrounding his transmitter; reception in the rest of the area will be ruined by heterodyne interference. * * * If the Commission grants A's application, B cannot appeal no matter what the effect of the decision may be on B; if the Commission denies A's application and A appeals, B cannot defend his victory before the reviewing court, which may reach a decision in A's favor with similar injury to B."

In the footnote to the above passage, the report states that the Court of Appeals, D.C., had indicated informally that in the latter case it would consider a motion by one in the position of B to intervene on appeal as an *amicus curiae*.

cessor to Section 402(c) accorded the right of intervention to persons seeking to defend the Commission order, *i.e.*, to "interested persons," which it defined as those "who would be aggrieved or whose interests would be adversely affected by a reversal or modification."

The effect of this precise draftsmanship is twofold: *First*, the same degree of potential injury which must be shown in order to appeal under Section 402(b) must also be demonstrated by a would-be intervenor under Section 402(c). It is most doubtful that the petitioner here could make that showing. Indeed, petitioner concedes (Pet. 11) that the "person aggrieved * * *" phrase is language of art under which standing to appeal depends upon the prospect of electrical interference or financial injury from the Commission's action, *Federal Communications Commission* v *Sanders Brothers Radio Station*, 309 U.S. 470, 476–477, and apparently does not maintain that

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Aside from this pre-enactment legislative history, Congress has subsequently confirmed our view of Section 402(c). The House Committee Report on the 1952 amendments to the Communications Act, which included revisions in the appellate procedures of Section 402, states with respect to Section 402 (c): "An 'interested party' is defined as any person who would be aggravated [sic] or whose interest would be adversely affected by a reversal or modification of the order of the Commission which is complained of." H. Rep. No. 1750, 82d Cong., 2d Sess., p. 17. This expression of Congressional intent supports the view that the second sentence of Section 402(c) was intended as a definition of "an interested person," and not, as petitioner argues (Pet. 13-15), as a specification of merely one class of persons who, among others, are to be considered as "interested."

its interest is of this nature. *Second*, and even more important, any person seeking to overturn a Commission decision reviewable under Section 402(b) must file its own appeal; it cannot simply intervene in support of the appeal of another party, claiming that the relief requested by the other party would also be satisfactory to it. Ordinarily, of course, parallel appeals will be consolidated. The point of the statutory procedure, however, is to ensure that each party challenging a Commission order will have brought itself within one of the categories enumerated in Section 402(b) and have filed promptly a notice of appeal setting forth succinctly the reasons upon which it intends to rely, as prescribed by Section 402(c).

3. The various other statutory provisions cited by petitioner which allow broader intervention only point up the differences in the scheme adopted by Congress for appeals from licensing orders of the Commission. For example, under Section 402(a) of the Act, review of Commission rule-making orders (and other orders not specified in 402(b)) is governed by the Judicial Review Act of 1950, 5 U.S.C. 1031-1042, Section 8 of which (5 U.S.C. 1038) explicitly authorizes intervention by parties "whose interests will be affected if an order is *or is not* enjoined, set aside, or suspended" (emphasis supplied).[*] The distinction thus drawn

[*] Section 8 provides in full: "The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. Com-

between intervention in Section 402(a) cases and intervention in 402(b) cases is a meaningful one. In rule-making proceedings, a large number of persons can be expected to submit comments to the Commission and to be interested parties on judicial review. In an appeal from a licensing action, however, the number of parties affected is usually quite small. Typically, a losing applicant or a station aggrieved by a license grant files an appeal, while the successful applicant intervenes in support of his victory. The requirement that aggrieved persons, in order to achieve the status of a party, pursue the remedy of appeal afforded by Section 402(b)(6) does not result, therefore, in an unwieldy multiplicity of suits, as might be the case if the same procedure were applicable to Section 402(a) proceedings. Accordingly, there is no need to interpret the narrower language of Section 402(c) as congruent with the broader intervention provision of Section 8 of the Judicial Review Act. Furthermore, the fact that the applicability of Section 402(c) is confined to Commission licensing actions appealable under Section 402(b) points up the lack of general importance of the question presented here.

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munities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order."

As petitioner correctly notes (Pet. 21), the use of rule-making as a vehicle for assigning television channels to particular communities dates only from 1952, contemporaneously with the most recent Congressional examination of Section 402 and long after enactment of the provisions with which this case is concerned.

4. Finally, contrary to petitioner's assertion (Pet. 17–19), the fact that the term "interested person" or similar phrases may have a broader meaning in Section 402(d) of the Communications Act, 47 U.S.C. 402 (d), and in Sections 4(b), 6(a) and 6(d) of the Administrative Procedure Act, 5 U.S.C. 1003(b), 1005(a) and 1005(d), does not warrant the conclusion that its scope must be equally broad under Section 402(e).

The notice of the filing and pendency of an appeal which, under Section 402(d), must be given by the Commission to "each person shown by [its] records * * * to be interested in said appeal," is designed to inform not only would-be intervenors, but also other persons who evinced an interest before the Commission which would warrant advising them of the further course of the proceedings. Prior to 1952, the statutory notification of the filing of an appeal (then contained in Section 402(c)) was given only "to each person shown by the records of the Commission to be interested in such appeal *and to have a right to intervene therein under the provisions of this section*" (48 Stat. 1093). (Emphasis added.) In the 1952 amendments to the Communications Act, however, Congress eliminated the italicized portion of this notice provision. Yet it simultaneously reiterated its intent that the term "interested person" in the intervention section (Section 402(c)) be "defined as any person who would be aggravated [sic] or whose interest would be adversely affected by a reversal or modification of the order of

the Commission which is complained of." H. Rep. No. 1750, 82d Cong., 2d Sess., p. 17. Petitioner's assertion that the change in Section 402(d) "was simply deleting a redundancy," (Pet. 19) is its own unfounded conjecture.

Nor does it follow that because Section 4(b) of the Administrative Procedure Act requires an "agency [to] afford interested persons an opportunity to participate" in rule-making, Section 402(c) should be construed to require the court of appeals to permit an equally wide category of persons to intervene in an appeal under Section 402(b) of the Communications Act. Participation before the agency may be broader than that authorized before a court. Moreover, as we have already pointed out, *supra*, p. 13, considerations appropriate to rule-making proceedings—which are reviewable not under Section 402(b), but under the Judicial Review Act of 1950,[10] are not necessarily

[10] *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 193, upon which petitioner relies (Pet. 17, 18), is inapposite to the present case. The statement in the decision quoted by petitioner (Pet. 17), to the effect that parties who could file statements under Section 4(b) of the Administrative Procedure Act "might also intervene in appeals," is dictum on a question not briefed and not "investigated with care, and considered in full extent." *Cohens* v. *Virginia*, 6 Wheat. 264, 399-400. Although the Court referred to Sections 402 (d) and (e) of the Communications Act, which are applicable only to appeals under Section 402(b), see S. Rep. No. 44, 82d Cong., 1st Sess., p. 11; H. Rep. No. 1750, 82d Cong., 2d Sess., p. 17, the statement was made in the course of reciting the history of the Commission rule-making proceeding of which review had been sought under Section 402(a) of the Act, 47 U.S.C. 402(a).

appropriate to licensing proceedings. Similarly, there is no reason to attribute to the phrase "interested person" in Section 402(c) of the Communications Act the same meaning which that term has in Section 6(d) of the Administrative Procedure Act, 5 U.S.C. 1005(d), which provides for notice and a statement of grounds in denying any written application, petition, or other request "of an interested person." In any event, if the scope of the phrase in Section 402(c) were equivalent to that in Section 6(d), petitioner would clearly have no right to intervene. For the *Attorney General's Manual on the Administrative Procedure Act*, p. 70, speaking in reference to Section 6(d), notes that "with respect to formal proceedings, the only interested persons are those who are 'parties' to such proceedings within the meaning of section 2(b)." Here, however, petitioner specifically disclaimed any intention to participate as a "party in interest" under Section 309(d) of the Communications Act, 47 U.S.C. 309(d), and was permitted to file an informal objection to the application only as might any other member of the general public under Section 1.361(a) of the Commission's Rules, 47 CFR 1.361(a) (Pet. App. 2a–3a). See Statement, *supra*, pp. 4–5. Thus, if the Commission had held a formal hearing on the application, petitioner would not have qualified as a "party in interest" under Section 309(d), nor as an "interested person" under Section 6(d) of the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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No. 589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, NEW ORLEANS TELEVISION CORPORATION, CAPITOL BROADCASTING COMPANY and AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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April 1963

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

The briefs in opposition of the Federal Communications Commission and New Orleans Television Corporation largely reiterate arguments on the merits that were made to the Court of Appeals and were therefore anticipated in our petition.

Neither brief in opposition disputes what cannot be disputed: that the ruling of the court below will govern intervention rights in all appeals from Federal Communications Commission licensing proceedings. The Commission says (Br. in Opp., p. 13) that the fact that only appeals from its licensing actions are involved

points up the lack of general importance of the question presented here." But this overlooks the fact that such appeals are a major part of the judicial proceedings arising from Commission action, and procedural questions relating to them have themselves a general importance going far beyond the instant case.

Somewhat related is New Orleans' statement (Br. in Opp., pp. 6-7) that Section 402(c) of the Communications Act "has been in effect for thirty-three years without challenge," and that "there is no great precedent potential" in the decision below "since it merely represents an application of existing law." So far as we are aware, the construction of Section 402(c) that New Orleans regards as being well settled was first adopted by the court below in an order entered two weeks before its order in this case. See Order of Nov. 1, 1962, in *Rhode Island Television Corp.* v. *FCC*, D. C. Cir. No. 17,255, dismissing notice of intention to intervene filed by Capitol Television Corporation. Theretofore such a rule was unknown. Thus, the question is novel as well as important to all future litigants in appeals from Commission action.

Three other points raised in the briefs in opposition merit a brief rejoinder.

1. The Commission states (Br. in Opp., pp. 8-9) that petitioner is not prejudiced by the order below because it has been allowed to file a brief *amicus curiae*. The contention begs the question by assuming that petitioner did not have a sufficient interest to justify intervention as a party. Appearance as an *amicus* is not the equivalent of participation as a party. As we pointed out in our petition, as *amicus curiae* petitioner will not have the right to file a reply brief, to participate in oral argument or to seek or to participate in

any further review in this Court. In *FCC* v. *NBC (KOA)*, 319 U.S. 239, 246, holding that intervention should have been allowed in a Commission proceeding, this Court said that it was "beside the point to discuss . . . the privileges accorded by the Commission to one denied intervention"—including in that case both the filing of a brief *amicus curiae* and the presentation of oral argument—since the respondent in that case "was entitled to participate in the proceedings."

2. The Commission says (Br. in Opp., pp. 14-15) that when the Congress in 1952 deleted from what is now Section 402(d) of the Communications Act the phrase "and to have a right to intervene . . ." it made a substantial change in the definition of persons to whom notice of the filing and pendency of an appeal from a licensing order must be given by the Commission. According to the Commission, the 1952 change, which was apparently not regarded as consequential by the congressional committees (see Pet., p. 19), expanded the notice requirement to include not only those who were entitled to intervene "but also other persons who evidenced an interest before the Commission which would warrant advising them of the further course of the proceedings." There was admittedly no substantial change in what is now Section 402(c), dealing with intervention, which the Commission argues has always meant that only those who would be aggrieved or adversely affected by reversal or modification of the Commission's order had a right to intervene. Thus, if the Commission were correct, it would be expected that prior to 1952 notice under what is now Section 402(d) was given only to the limited category of persons that on its view were then and are now entitled to intervene. In fact this was not so. Examina-

tion of the Commission's dockets in some multi-party licensing cases in which appeals were taken before the 1952 change indicates that the statutory notice was given to all parties, as it apparently is now, and not merely to the party who alone would be aggrieved or adversely affected by reversal or modification of the order.[1] This is further support for petitioner's view that the Congress in 1952 was simply deleting a redundancy in Section 402(d). It is also further support for petitioner's view that the right to intervene was not intended by the Congress nor interpreted by the Commission to be limited only to those who would be aggrieved or adversely affected by reversal or modification of the order under appeal.

3. The Commission urges (Br. in Opp., pp. 14-16) that the use of the phrase "interested person" in other related statutory provisions does not bear upon its meaning as used in Section 402(e) of the Communications Act. Among other things, the Commission cites the *Attorney General's Manual on the Administrative Procedure Act*, which says at page 70 with respect to Section 6(d) of the Administrative Procedure Act that in formal proceedings interested persons are only those who are "parties" within the meaning of Section 2(b) of that act. It goes on to contend that petitioner was not a party within the meaning of Section 2(b) and therefore not an interested person under Section 6(d). But Section 2(b) is quite to the contrary. According to Section 2(b), petitioner was a party to the Commission proceeding from which the appeal to the Court

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[1] *E.g.*, Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951) (FCC Docket Nos. 7694, 7817, 7962); Bay State Beacon, Inc. v. FCC, 171 F.2d 826 (D.C. Cir. 1948) (FCC Docket No. 6845). In Easton Publishing Co. v. FCC, 175 F.2d 344 (D.C. Cir. 1949), the Commission gave statutory notice to the losing parties below (FCC Docket No. 7179), and one such party intervened in the Court of Appeals *on the side of the appellant*.

of Appeals was taken. Section 2(b) defines a party as "any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding," and it then goes on to provide that nothing in the statute "shall be construed to prevent an agency from admitting any person or agency *as a party* for limited purposes." 5 U.S.C. § 1001(b). (Emphasis added). This is the very least that the Commission did when it allowed, over the objection of New Orleans, "the limited participation sought by" this petitioner in its proceeding.[2]

The question presented is substantial as well as important, and the petition for certiorari should be granted.

Respectfully submitted,

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[2] Contrary to the implication of both New Orleans (Br. in Opp., p. 10) and the Commission (Br. in Opp., p. 16), petitioner's participation in the Commission proceeding was allowed not only because of the Commission's Rule 1.361(a), 47 C.F.R. § 1.361(a), but also because, as recited by the Commission, it was one of the "interested parties" the Commission had previously stated would be allowed to respond to New Orleans' application and because of the intimate inter-relationship between the omnibus rule making case, Docket No. 13340, in which petitioner was unquestionably a party, and the proceeding on New Orleans' application. (Pet. App., p. 3a).